November 14, 2011

TO: Bruce Gibson, Frank Mecham; Warren Jensen; Rita Neal; Jim Grant; Tami Douglas-Schatz; Dan Buckshi
FROM: Jeannie Nix and Bill Tappan
SUBJECT: Work Group

Dear Work Group Members:

Commissioner Tappan and I will not be attending the meeting that is scheduled for November 17, 2011. Because of our concerns as stated below and progress toward better understanding between HR and CSC, we recommend that this work group be disbanded.

We were appointed by the Civil Service Commission (CSC) to meet with two Supervisors to gather facts specific to accusations serious enough to cause supervisors to call into question the integrity and behavior of the CSC. We are disappointed that the meetings have not produced the requested specific facts regarding the accusations brought against the CSC. Rather than the collaborative discussion hoped for, Bill and I have been repeatedly caught off guard and have not received advance information that the rest of the group had in preparation of the meetings. There seems to be an assumption of wrong doing by the CSC; and a focus on second guessing the motives, decisions and due process actions of the CSC.

We are concerned about the possible breach of the Brown Act related to the very composition of the work group and the nature of the proposed discussion. Attached is a summary of my notes from an attorney well-versed in Brown Act law whom I consulted after looking at references to permissible meetings of "Less Than a Quorum" (LTAQ) in the Brown Act. Seemingly the work group, as configured with active employee involvement; discussions of proposed ordinance changes; and a stated goal to impose inclusion of the HR Director in closed deliberations of the CSC, is addressing matters that require discussion at a public meeting.

To properly fulfill the very critical role of a neutral CSC where management and employees can go to present issues related to employment grievances and disciplinary actions, the CSC must have independence. Such independence includes the ability to deliberate in closed sessions with only the commissioners and CSC counsel present.

At the first Work Group meeting, reference was made to Civil Service Procedural Guidelines section III Commission Staff; item A "*The Personnel Director or his/her representative and staff shall be present at all meetings of the Commission.* That guideline, rather than meaning that the "Personnel Director" "shall" be included in commission deliberations, that guideline instead refers to the role of the Personnel Director as administrative support to the commission. In that role, the "Personnel Director" is a critical participant during regular meetings open to the public as well as during meetings closed to the public to protect the privacy of personnel matters brought to the Commission for adjudication. The term "meeting" either open to the public or closed to the public contrasts significantly with the term "closed session" as used to refer to times when the CSC retires from the "meeting" for the purpose of deliberating on facts and rendering decisions.

The CSC has repeatedly, publicly and sincerely expressed our intention to work cooperatively, efficiently and effectively with the HR Director. The CSC has received clarification regarding HR authorization for any "special projects" outside the normal grievance / appeals hearing process. The CSC was never previously advised or aware of such a requirement. The CSC and the HR Director can now move forward

to assure compliance with the direction of the Supervisors and clarify any questions on a case by case basis directly between the CSC and HR.

Clearly the Board of Supervisors, the CSC and HR Director all desire a positive working relationship. While there are differences of opinion on some issues, we believe that building a better relationship will best occur directly between HR and CSC. We hope that Tami would first bring any future concerns directly to the commission so that we can work together to reach a mutually satisfactory resolution.

Being mindful of reported complaints of Department Heads that they perceived CSC bias, Bill asked CSC Counsel, Rita Neal, 3 times for specifics regarding these complaints. Our desire is to understand what their concerns were. I reviewed 4 cases heard by the CSC over the past year. The matters of bias or lack of due process were accusations that astonished me, so I sought insights to help improve my work on the Commission. In cases of discipline, the Department has the burden of proof (51%). Why, with my background as an executive director, did I find that the burden of proof was not met?

Two of the four appeals that I reviewed resulted in finding in favor of the appellant; one found partially in favor of the appellant; and one found in favor of the department. In the case that upheld the department's termination, the CSC found that the department had done an excellent job of progressive discipline. In the other three cases, multiple factors, different in each case, the CSC found that the department had either made mistakes in the investigation / discipline process and /or lacked sufficient substantiation to meet their burden of proof. After carefully considering all the factors and recalling the evidence, I would not change my vote in any of the cases that I reviewed.

While the inclination of Departments / HR / the Board of Supervisors may be to question the CSC when they disagree with a decision, we firmly believe the CSC must make independent decisions based on the evidence before us in a hearing. We would hope those Departments / HR and the Board of Supervisors would look carefully into the processes and information they rely upon to discipline employees to provide evidence that meets their burden of proof.

Because of our above stated concerns and current progress toward better understanding between HR and CSC, we recommend that this work group be disbanded.

## SUMMARY OF CAUTION

[*Jeannie Nix Notes based on consultation with an attorney*]

This expresses concern that the "working group" comprised of two county supervisors, three county executives, and two civil service commissioners is a separate legislative body subject to the Brown Act.

Under Government Code 54952(b) "legislative body" includes a "commission, committee, board, or other body of a local agency … created by … formal action of a legislative body." Both the board of supervisors and the civil service commission are legislative bodies. Code 54952(b) has an "Less Than A Quorum" exception for ad hoc advisory committees, composed solely of the members of the legislative body that are less than a quorum.

The SLO board of supervisors met in closed session under code 54956.9(b) to receive advice from its legal counsel regarding pending litigation. The subject of the closed session was not identified. Following this, meetings occurred between four individual supervisors and their respective appointed commissioners. Each supervisor told their individual commissioner that according to the HR Director the commission was out of control and that there had been a complaint about commissioners' conduct in an appeal hearing. The specifics of the complaint were not identified.

Concern was expressed over the commission's legal expenses for disciplinary hearings. Neither the quality of the work, nor the need nor the or time required for any particular item was questioned. The HR Director sent a memo (not attorney-client privileged) to the commission questioning its calling of a witness. This prompted the commission to ask for advice on its authority to consider whether or not this was correct.

The commission discussed these meetings with their respective supervisors at its 8/3/11 regular meeting. The commission president read into the record her notes on the meeting she had with the board chair and distributed a discussion outline of concerns and issues. The matter was placed as an item for discussion on the agenda for the commission's next regular meeting. At the 8/24/11 meeting, the HR Director, at the direction of the board, of supervisors, informed the commission that the board had created a sub-committee composed of two supervisors to meet with representatives of the commission to discuss complaints and develop a positive working relationship.

The commission approved a committee in public session and appointed two commissioners to meet with two supervisors. It is unclear whether the Board members approved a committee in public session and appointed its two members who are now serving. Whether representatives of county administrator, county counsel, and HR are acting in an advisory capacity to supervisors and commissioners or as members of the body is unknown. The critical factor is participation in decisions, e.g. voting.

To preserve the "Less Than A Quorum" exception, it is important that a committee of the commission be composed solely of commissioners less than a quorum to meet with a similarly composed less than a quorum committee of board members. An entity composed of commissioners and supervisors (or other county officials as voting members) does not qualify for the LTAQ exception and is subject to the Brown Act.

Two committee meetings have occurred. At the September 28, 2011, commission meeting, it was reported that there was nothing to report regarding the "working group" because the group had been instructed not to report to the commission (apparently until decisions have been made). Presumably, this instruction was to preserve the confidentiality of privileged information related to litigation and to protect personnel privacy. This raises the question whether the "working group" is a separate county advisory body created by the board of supervisors and not a meeting of two separate "Less Than A Quorum" committees.

If the working group is a separate county advisory body, it must comply with the Brown Act including agenda preparation, public discussion of general items of business (for example, ordinance amendments) and noticed closed meetings to preserve confidentiality of litigation and personnel matters.

It is prudent for the commissioners who are part of this "working group" to get a written legal opinion on the following questions:

1. Is the "working group" a body subject to the Brown Act?
2. Was the working group lawfully created? If so, was the Board required at a regular board meeting to disclose the action creating the group and establishing its function?
3. Was there a complaint against an "employee" as defined by the Brown Act? If so, was notice required under code 54957(b)(2)? Members of legislative bodies, for example, commissioners, are not considered "employees" for purposes of 54957. However, under (b)(4), "employee" includes "an officer or an independent contractor who functions as an officer ... but not other independent contractors."
4. If the working group is a body subject to the Brown Act:
    a. Did the members of the group discuss matters that should have been discussed at a noticed public meeting?
    b. If so, do any of the members face criminal liability under code 54959 for depriving the public of information to which it is entitled?